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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JUAN SAAVEDRA et al., Plaintiffs and Respondents, v. CITY OF GLENDALE, Defendant and Appellant.	B281991 (Los Angeles County Super. Ct. No. BC539160)

APPEAL from judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed in part, reversed in part, and remanded.

Colantuono, Highsmith & Whatley, Michael G. Colantuono, David J. Ruderman, Jon R. di Cristina; Michael J. Garcia and Christine A. Godinez, for Defendant and Appellant.

Schwartz, Steinsapir, Dohrmann & Sommers, D. William Heine and Daniel E. Curry, for Plaintiffs and Respondents.

A charter city operating its own electric utility increased electric rates in 2013 based on a rate study that allocated an annual amount to the city's general fund. A utility employee and his union filed a petition for declaratory relief and a writ of mandate on the ground that the annual amount transferred to the general fund was a tax requiring voter approval. The trial court found the new rates were a tax, because the annual transfer was not a cost of providing electric service. On appeal, the City contends the lawsuit is barred by the 120-day statute of limitations provided in Public Utilities Code section 10004.5. We conclude, however, that the city waived this statute of limitations defense by failing to timely raise Public Utilities Code section 10004.5. The City further contends the electric rates imposed in 2013 were not a tax requiring voter approval. We find that the rates set in 2013 exceeded the city's reasonable costs in providing electric services. The amount that exceeded the reasonable costs to provide service was a tax. The trial court did not determine, however, whether the amount of the tax included in the 2013 rates increased from the amount of the tax that was imposed under prior rates. If the tax, which was previously imposed in prior rates without an end date, did not increase under the new rates, voter approval was not

required. Accordingly, the portion of the judgment that ordered remedies for tax violations must be reversed and the case remanded for the trial court to determine whether the 2013 rates increased the tax, requiring voter approval.

FACTS

Accounting Provisions of the City Charter

The City of Glendale is a charter city within the County of Los Angeles. Glendale Water and Power (the Utility) is a department within the City, which consists of a waterworks and an electric works. The accounting structure in the City's charter requires the City to establish separate funds for different purposes. The "general reserve fund" is a permanent, revolving fund. The City's running expenses are paid from the general reserve fund on a cash basis by advancing money to other funds as needed until property taxes are collected.

The charter requires a "revenue fund" for the electric works, a "depreciation fund" for the electric works, and a "surplus fund"[1] for the electric works and waterworks

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[1] Section 22 of Article XI of the charter provides: "A fund to be known as the Glendale Water and Power surplus fund is hereby created, to which fund shall be credited from the receipts of the department of Glendale Water and Power in the waterworks revenue fund and the electric works

combined. Receipts derived from the electric works are credited to the electric works revenue fund. Each year, the city council must set aside from the income paid into the electric works revenue fund the amount that the city manager estimates will be sufficient to meet normal depreciation expenses of the electric works and place the amount for depreciation expenses in the electric works

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revenue fund, any amounts in excess of the requirements of the several funds as hereinbefore set forth. Except as otherwise provided in this section, disbursements from said Glendale Water and Power surplus fund may be made by the council by special appropriation for waterworks or electric works purposes only, which shall include payment of all or any portion of the tax of the Metropolitan Water District of Southern California, or its successors in interest, which the council may elect to pay out of the funds of the City of Glendale. [¶] At the end of each fiscal year an amount equal to twenty-five (25) percentum of the operating revenues of the department of Glendale Water and Power for such year, excluding receipts from water or power supplied to other cities or utilities at wholesale rates, shall be transferred from said Glendale Water and Power surplus fund to the general reserve fund; provided, that the council may annually, at or before the time for adopting the general budget for the ensuing fiscal year, reduce said amount or wholly waive such transfer if, in its opinion, such reduction or waiver is necessary to insure the sound financial position of said department of Glendale Water and Power and it shall so declare by resolution. (1921; 1931; 1941; 1946; 1949.) [¶] (Res. No. 04-238, § 1, 12-7-2004)."

depreciation fund. The amounts placed in the depreciation funds may only be used for the repair, replacement, improvement and extension of the plants and equipment of the utility service from which the revenue was derived. In other words, the charter requires the council to set aside enough cash each year to pay for the repair, replacement, and improvement of the equipment necessary to efficiently deliver the utility services. The City may also issue bonds for these purposes.

All disbursements for the electric works, other than depreciation expenses, are to be charged to the revenue fund. Any credit balance in the revenue fund at the end of the fiscal year in excess of outstanding demands and liabilities is transferred to the Utility's surplus fund. Disbursements from the Utility's surplus fund can be made for waterworks or electric works purposes, unless otherwise provided. The City's voters amended the city charter in 1946 to require an amount equal to 25 percent of the Utility's operating revenues, excluding receipts from water or power supplied at wholesale rates, be transferred from the Utility's surplus fund to the City's general reserve fund at the end of each fiscal year (the annual transfer). The city council may reduce or waive the amount of the annual transfer if necessary, in the council's opinion, to insure the sound financial position of the Utility.

Accounting Practices during the Relevant Fiscal Years

The City did not maintain separate funds in the manner described in the charter. During the fiscal years at issue, the City comingled its cash in a single account and created different funds that complied with generally accepted accounting principles (GAAP). The City had one "electric fund," which contained sub-funds for electric revenue, electric depreciation, and electric surplus. The electric depreciation fund tracked the amounts that the City budgeted and expended for capital expenditures only. It did not account for the depreciation expenses of existing plants and equipment. The electric depreciation fund was also closed out at the end of each fiscal year, and the value of any completed capital assets was transferred to the electric surplus fund.

The electric surplus fund was a balance sheet for the Utility's electric operations. In addition to cash and liquid assets, it reflected the value of fixed assets and liabilities. In other words, the electric surplus fund did not simply hold the surplus cash of the electric works, but was a balance sheet for accounting purposes that reported the profits, losses, assets, liabilities, and equities of the Utility. At the end of each fiscal year, the City made an annual transfer to the general fund directly from the electric revenue fund and recorded it as an expense of the electric fund. The City also made annual transfers to the general fund from the waterworks revenue fund.

The City's Electric Utility Rates Prior to 2013 and Limitations on Taxes

California voters enacted a series of voter initiatives beginning with Proposition 13 in 1978, amending the California Constitution to limit the ability of state and local governments to collect revenue through taxes, fees, charges, and other levies without voter approval. (Cal. Const., arts. XIII A, XIII C, XIII D.) Proposition 218 added articles XIII C and XIII D to the California Constitution in 1996. (*Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 918.) Article XIII C prevents local governments from assessing general or special taxes without obtaining voter approval. Under Article XIII C, local governments may not impose, extend, or increase a general tax without obtaining approval from a majority of the voters or a special tax without approval of two-thirds of the voters. (Cal. Const., art. XIII C, § 2, subds. (b), (d).)[2]

In May 2006, the City amended the Glendale Municipal Code to increase electric rates, effective July 1,

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[2] Article XIII D limits the ability of local governments to enact property-related taxes, assessments, fees, and charges. (Cal. Const., art. XIII D, § 3, subd.(a).) For the purposes of Article XIII D, however, fees charged for electrical or gas service are not deemed charges or fees imposed as an incident of property ownership. (*Id.*, art. XIII D, § 3, subd. (b).)

2007. The base rate included an amount to yield a "reasonable rate of return on investments to effectuate the [annual] transfer to the City's General Fund." On June 30, 2010, the City transferred $19,107,000 from the electric revenue fund directly to the general fund and accounted for the transfer as an expense of the electric fund.

Proposition 26, effective in November 2010, added subdivision (e) to article XIII C, section 1. Subdivision (e) broadly defines a "tax" for purposes of article XIII C to mean "any levy, charge, or exaction of any kind imposed by a local government," with seven exceptions. (Cal. Const., art. XIII C, § 1, subd. (e).) If a charge falls within one of the exceptions, the charge is not a tax as a matter of law. (*California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1048.) As relevant in this case, a tax does not include "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Cal. Const., art. XIII C, § 1, subd. (e)(2).)

The city council suspended the annual transfer from the waterworks operating revenue fund to the general fund as of 2011. On June 30, 2011, the City transferred $19,107,000 from the electric revenue fund to the general fund. At the end of the 2012 fiscal year, the City transferred $21,107,000 from the electric revenue fund to the general fund.

The City's 2013 Electric Rate Increases

At the beginning of the City's 2013 fiscal year, the Fitch credit rating agency lowered the Utility's credit rating based on a combination of factors, including the Utility's rising costs. In October 2012, the City notified Utility employees that a reduction in force was necessary, eliminating 25 positions and affecting 28 employees. The notice to employees stated that the reduction in force was "due to the current financial state of the utility, specifically a $10.8 million shortfall in the electric fund for the 2012/2013 fiscal year. As the financial condition of the utility continues to worsen and the electrical fund balance diminishes, we see no alternative other than an immediate scale-back of all existing scheduled Capital Projects in the Electrical Section, thus requiring less staff, primarily in construction and substructure work." The layoffs were intended to reduce costs, restore the financial viability of the electric fund, align staffing levels with the reduced workload, and create a more efficient organizational structure. In February 2013, Fitch concluded the Utility had a "Negative Outlook" based on several factors, including a lack of net income.

At the end of the fiscal year in June 2013, the City transferred $20,857,000 from the electric revenue fund to the general fund. The transfer reduced the Utility's cash reserve funds to 59.4 percent of the required cash reserve level for the 2013 fiscal year.

The City hired Borismetrics to conduct a cost of service analysis for the Utility. Borismetrics completed a rate analysis in August 2013 based on data from fiscal year 2012. The analysis noted that the standard practice prior to Proposition 26 was to allow rates within approximately 10 percent of the utility's allocated costs based on a cost of service analysis. Electric rates adopted or increased after Proposition 26 took effect generally could not exceed the reasonable cost of providing electric service and must bear a reasonable relationship to the ratepayer's burdens on or benefits from the service. Borismetrics stated that the City's current rates did not recover the Utility's costs from the residential class and relied on cash reserves. The new rates proposed by Borismetrics included a charge to fund the annual transfer to the general fund, based on the transfer of $21,107,000 in fiscal year 2012. In one table that showed the allocation of costs and credits among classifications, costs were offset by wholesale revenue of $18,811,000.

The City's general manager submitted a report to the city council recommending that the City increase electric rates over five years as follows: 8 percent in fiscal year 2014; 7 percent in fiscal year 2015; 5 percent in fiscal year 2016; 2 percent in fiscal year 2017; and 2 percent in fiscal year 2018. The recommended rate plan would accomplish several goals and bring the Utility closer to its cash reserves goal of $124 million, although it would remain short of the target balance by approximately $10 million. The report listed measures the City had taken to reduce the Utility's operating costs,

including reducing the amount that the Utility transferred annually to the general fund by $250,000 per year. On August 13, 2013, the City amended its rate ordinance to raise electric rates, effective as of September 2013.

At the end of the 2014 fiscal year, on June 30, 2014, the Utility had $156 million in cash and cash equivalents, of which $60 million were bond proceeds that were restricted and unavailable to pay the annual transfer. The City passed a resolution to reduce the amount of the annual transfer to insure the sound financial position of the Utility. The City transferred $20,607,000 from the electric fund, which was 12.2 percent of the electric works operating revenue, directly to the general fund.

On June 3, 2014, City adopted its budget for fiscal year 2015, which included a transfer to the general fund of $20,357,000. On June 2, 2015, the city council authorized the transfer by a resolution declaring that the reduction in the annual transfer was necessary to insure the sound financial position of the Utility.

PROCEDURAL HISTORY

On February 25, 2014, Glendale Coalition for Better Government (the Coalition), a nonprofit corporation formed by residents of Glendale, filed a petition against the City for writ of mandate, writ of prohibition, and declaratory relief.

On March 12, 2014, Utility employee Juan Saavedra and the International Brotherhood of Electrical Workers

Local 18, AFL-CIO (collectively the Union) filed the action in this case against the City for declaratory relief and a writ of mandate on behalf of employees and union members who pay for electric services from the Utility. The City filed a demurrer.

The cases were ordered related on April 29, 2014. A hearing was held on the demurrer to the Coalition's action on July 15, 2016. The trial court found the statute of limitations in Code of Civil Procedure section 338, subdivision (a), applied to most, if not all, of the Coalition's claims. The court sustained the City's demurrer to the Coalition's complaint with leave to amend to allege the relevant dates that funds were transferred. The court consolidated the cases for trial purposes only.

The Union filed an amended complaint on July 9, 2014, seeking declaratory relief and a writ of mandate. The petition sought a declaration of the limitations on the City's right to transfer funds from the Utility to the general fund and a writ of mandate to return excess amounts to the electric works revenue fund for the fiscal years ending in June 2013 and 2014. The petition also sought an order restraining the City from transferring funds for the fiscal year ending in June 2015. The petition sought a declaration that the City had abused its discretion by transferring funds that endangered the sound financial position of the Utility and caused layoffs or reassignment of more than 20 employees of the Utility. The petition sought an order directing the City to restore the improperly transferred

funds to the electric works revenue fund, reinstate employees who lost jobs as a result of the funding shortfall, and restore lost pay and benefits.

The Coalition filed an amended complaint on August 5, 2014, seeking a writ of mandate, writ of prohibition, and declaratory relief. The Coalition's petition sought to return funds transferred to the general budget fund in the fiscal years ending in June 2011 through 2014, to the electric works revenue fund. The petition also sought to prevent the annual transfer for the fiscal year ending June 2015. In addition, the petition sought a declaration that: (1) the increase in the electric rates on August 13, 2013, was a tax subject to the voter approval requirements of Article XIII C, subdivision (2)(b), because it was beyond the level previously approved by the City and revised any previously approved methodology; and (2) prohibited the City from increasing electric rates without submitting the increase to a vote under Article XIII C.

The City filed answers to the petitions. Among other defenses, the City alleged that each cause of action was barred by the applicable statutes of limitation, including, but not limited to, section 338 of the Code of Civil Procedure.

At a hearing on December 15, 2015, the trial court ordered the issues of liability and remedy bifurcated for trial. The parties submitted trial briefs and supporting evidence. The Union submitted the declaration of accounting expert David Vondle. Vondle characterized the accounting provisions of the City's charter as financially conservative.

The Utility's financial position was protected by requiring utility expenses and capital expenditures to be funded with cash, and crediting excess cash to the Utility's surplus fund. The full amount of the annual transfer could be made under the charter only if there was sufficient surplus cash in the Utility's surplus fund after all other obligations have been satisfied. As a result, the amount of the annual transfer could never be more than the amount of surplus cash held in the Utility's surplus fund at the end of the fiscal year.

The city council also had discretion to reduce or waive the amount of the annual transfer if necessary to insure the sound financial position of the Utility. In Vondle's opinion, the soundness of the utility's financial position should be evaluated based on whether the utility had a positive cash flow and adequate cash reserves for emergencies. The council should reduce the amount of the transfer when necessary to keep the cash reserve level near the target of $124 million set in 2006. The annual transfers for the 2012, 2013, and 2014 fiscal years were higher than the three preceding years, despite elimination of capital improvement projects and termination of employees.

Vondle listed violations of the city charter. The City did not maintain and fund the electric works depreciation or the Utility's surplus fund as provided in the charter. The City did not make the annual transfers from the surplus fund, which allowed the City to avoid the limitation built into the charter to restrict the amount of the annual transfer to the surplus cash remaining after accounting for operating

expenses and depreciation. The City did not sufficiently reduce the amount of the annual transfer in 2013 or 2014 to insure the Utility's sound financial position, as reflected by the Fitch assessments and the low level of cash reserves. Vondle declared that there would have been sufficient cash for capital improvement projects and no layoffs would have been required if the City had funded the electric depreciation fund for fiscal years 2013 and 2014 consistent with the charter.

Vondle also declared that the City's rates for electricity in fiscal years 2011 through 2014 exceeded the reasonable cost to the City of providing service to customers. The rate that became effective in 2007 included the cost of the annual transfer as an "operating expense" of the Utility and was justified as a reasonable rate of return on investments to effectuate the annual transfer to the general fund. The cost of service analysis performed in 2013 also included the annual transfer, but the annual transfer was not a component of the City's cost of providing service to its customers.

The trial court issued tentative rulings in each case. A trial was held on June 9, 2016. After extensive discussion of the accounting issues and any factual inaccuracies in the tentative rulings, the trial court addressed the effect of Proposition 26. The City asserted for the first time that the claims were barred by the 120-day statute of limitations contained in Public Utilities section 10004.5 and apologized for failing to include the issue in the City's trial brief. The

City's attorney noted that a similar claim against the Los Angeles Department of Water and Power concerning transfers to the general fund had been found barred in another department. The trial court concluded that the City had not raised the issue and would have to raise it by way of a motion for new trial.

The trial court granted the Union's petition in part. The court found the Union was entitled to a judgment that the annual transfers for the fiscal years 2012 through 2015 were not made from the Utility's surplus fund as required by the City's charter, and an injunction barring future transfers in violation of the charter's accounting provisions. The trial court denied the Union's requests for a declaration that the annual transfers endangered the Utility's sound financial position, and for a writ of mandamus compelling the City to return the transferred amounts to the surplus fund and restore the Utility employees who were laid off. The trial court also found the Union was entitled to a declaration that the City violated Proposition 26 by including an amount to fund the annual transfers in the 2013 electric rates and in charges to customers for fiscal year 2014. The court denied the Union's request for a writ of mandamus ordering the reinstatement of employees based on the Proposition 26 violations.

The trial court granted the Coalition's petition in part as well. The court found that the City's funding and accounting practices did not comply with the city charter. The Coalition had sought a writ compelling the City to

return the amount of the annual transfers for fiscal years 2011 through 2015 to the Utility's surplus fund, which the court denied because the Coalition had not shown that the City abused its discretion in making the general fund transfers for those years. The trial court found that the City violated Proposition 26 by including the annual transfers in the 2013 electric rates and in charges to customers for fiscal years 2014 to the present. The court noted that the City would not have violated Proposition 26 if the annual transfer was paid from a revenue stream other than retail rates, but that the City conceded the annual transfer was included in the calculation of the 2013 rates. The Coalition was entitled to a declaration that the City's 2013 electric rate increase violated Proposition 26, and an injunction preventing the City from increasing electric rates in the future based on the annual transfer without voter approval.

Remedy

The parties submitted additional briefing on the issue of appropriate remedies. The trial court issued tentative rulings. After a hearing on August 11, 2016, the trial court ordered several remedies in connection with the Union's action. The court issued a writ of mandate compelling the City to maintain the funds mandated by the charter and to cease including the annual transfer in electric rates charged to consumers unless approved by a majority of the Glendale electorate. The court issued a permanent injunction

enjoining the City from taking several actions, including merging or splitting the funds mandated by the charter, transferring revenue directly from the electric fund to the general fund, and charging rates that include the annual transfer. The trial court issued a declaration that the City had a duty to comply with provisions of the city charter and California Constitution Article XIII C. The court issued a writ of mandate providing rebates or restitution to the ratepayers in the amount of the annual transfers. The amount of the rebates was $61,071,000 as of June 30, 2017, and would increase by a set amount each month.

In connection with the Coalition's action, the trial court issued a declaration that the 2013 electric rate increase violated Proposition 26 and an injunction preventing the City from applying the 2013 electric rates based on the annual transfer without obtaining voter approval. The court found the Coalition was entitled to a writ of mandate compelling the City to credit ratepayers with the amount of the general fund transfer paid from August 2013 to the present. For the charter violations, the court issued a declaration that the City had a duty to comply with the charter's accounting provisions.

The City filed a motion for a new trial on November 21, 2016, on the grounds that Proposition 26 did not apply, voters approved the transfers in 1941 and 1946, and the claim was barred by the statute of limitations under Public Utilities Code section 100004.5. The trial court denied the motion.

The trial court entered judgment on January 26, 2017. The City filed a timely notice of appeal from the judgment. The Union and the Coalition filed motions for attorney fees, which the trial court granted. The City appealed from the post-judgment motions for attorney fees as well.

DISCUSSION

Standard of Review and Principles of Statutory Construction

The trial court's ruling in this case construed article XIII C of the California Constitution, as amended by Proposition 26, to determine whether the amount charged exceeded reasonable costs. "We review the ruling de novo to the extent that the court decided questions of law concerning the construction of constitutional provisions and not turning on any disputed facts. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032 (*Professional Engineers*).) We review the court's factual findings under the substantial evidence standard. (*Ibid.*)" (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1316 (*Schmeer*).)

"We construe provisions added to the state Constitution by a voter initiative by applying the same principles governing the construction of a statute. (*Professional Engineers, supra,* 40 Cal.4th at p. 1037.) Our task is to ascertain the intent of the electorate so as to effectuate the purpose of the law. (*Robert L. v. Superior*

Court (2003) 30 Cal.4th 894, 901.) We first examine the language of the initiative as the best indicator of the voters' intent. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321.) We give the words of the initiative their ordinary and usual meaning and construe them in the context of the entire scheme of law of which the initiative is a part, so that the whole may be harmonized and given effect. (*Professional Engineers, supra,* at p. 1037; *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043.)" (*Schmeer*, *supra*, 213 Cal.App.4th at p. 1316.)

"If the language is unambiguous and a literal construction would not result in absurd consequences, we presume that the voters intended the meaning on the face of the initiative and the plain meaning governs. (*Professional Engineers, supra,* 40 Cal.4th at p. 1037; *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) If the language is ambiguous, we may consider the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters' intent and understanding of the initiative. (*Professional Engineers, supra,* at p. 1037.)" (*Schmeer*, *supra*, 213 Cal.App.4th at pp. 1316–1317.) "The construction of statute or an initiative, including the resolution of any ambiguity, is a question of law that we review de novo. (*Bruns v. E–Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724.)" (*Ibid.*)

Waiver of Statute of Limitations

The City contends the claims based on Proposition 26 are barred by the statute of limitations set forth in Public Utilities Code section 10004.5. The City waived this defense, however, by failing to allege the code section in the City's answer or to raise the issue in the City's trial brief.

Code of Civil Procedure section 458 provides, "[i]n pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section ____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred." (Code Civ. Proc., § 458.)

"There are two ways to properly plead a statute of limitations: (1) allege facts showing that the action is barred, and indicating that the lateness of the action is being urged as a defense and (2) plead the specific section and subdivision. (*Brown v. World Church* (1969) 272 Cal.App.2d 684, 691.) . . . The failure to properly plead the statute of limitations waives the defense. (*Mysel v. Gross* (1977) 70 Cal.App.3d Supp. 10, 15.)" (*Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91 [finding statute of limitations defense waived when trial brief relied on a code section other than the code section pled in the answer].)

In this case, the City waived its defense based on Public Utilities Code section 10004.5 for failing to plead the code section in its answer to the complaint. The Union was not required to demur to the City's answer, because the answer sufficiently presented a statute of limitations defense based on the code section specified. The City failed to even raise Public Utilities Code section 10004.5 as a defense in their trial brief. The City did not raise the issue until after the presentation of evidence in the liability phase had been completed and the trial court had issued tentative rulings. The City waived the statute of limitations contained in Public Utilities Code section 10004.5 as a defense.

The City's reliance on *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, is not persuasive. The appellate court in *616 Croft* found a defendant had sufficiently pled the statute of limitations as a defense by alleging simply that "'every purported cause of action therein, is barred by any and all applicable statutes of limitation.'" (*Id.* at p. 628.) *616 Croft* did not discuss Code of Civil Procedure section 458 or cite any authority in support of its conclusion, and the opinion does not reveal whether the defendant raised the applicable statute of limitations prior to trial in the defendant's trial brief or any other timely manner which would have allowed amendment of the answer.

Tax Determination

The parties agree that prior to 2010, voter approval was not required for the City to impose a charge on electricity consumers to generate revenue for the annual transfer to the general fund. The parties also agree that Proposition 26 did not apply retroactively to local government charges for electricity service. The action challenged in this case was the amendment of the electric rate ordinance in 2013. The City contends the rates charged to electricity ratepayers were not a tax requiring voter approval. We conclude that a portion of the 2013 rates exceeded the Utility's reasonable costs of providing electric service, and the excess was a tax under the definition enacted by Proposition 26.

A. Restrictions on Charges Imposed by Charter Cities

Proposition 26, passed by the voters in 2010, added a definition of "tax" to Article XIII C, section 1, of the California Constitution. (*Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1 (*Redding*).) For purposes of article XIII C, a tax is "any levy, charge, or exaction of any kind imposed by a local government," with seven exceptions. (Cal. Const., art. XIII C, § 1, subd. (e).) One exception is for charges "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable

costs to the local government of providing the service or product." (*Id.*, art. XIII C, § 1, subd. (e)(2).) "A charge that satisfies an exception is, by definition, not a tax." (*Redding*, *supra*, at p. 11.) "The local government bears the burden of establishing the exceptions. (Cal. Const., art. XIII C, § 1, subd. (e).)" (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 260.)

A "general tax" is "any tax imposed for general governmental purposes." (Cal. Const., art. XIII C, § 1, subd. (a).) A "special tax" is "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." (*Id.*, art. XIII C, § 1, subd. (d).) "Local government" includes "any county, city, charter city, special district or any other local or regional governmental entity." (*Id.*, art. XIII C, § 1, subd. (b).)

Article XIII C, section 2 provides in relevant part: "(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. . . . [¶] (b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. . . . [¶] (c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue

of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b). [¶] (d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved."

The California Supreme Court recently distilled three questions to determine whether a challenged charge is an invalid tax: "(1) Is the alleged tax a levy, charge, or exaction imposed by a local government?; (2) Does it satisfy an exception to the definition of tax?; and (3) If it does not, was it properly approved by the voters? If a levy, charge, or exaction is imposed by a local government and does not fit within an exception, it is a tax which must be approved by the voters in order to be valid." (*Redding*, *supra*, 6 Cal.5th at p. 12.)

B. Annual Transfer is not a Tax

The Union alleged that the amounts transferred to the City's general fund were a tax in violation of constitutional provisions. An intrafund transfer, however, must be distinguished from the rate charged to customers. The intrafund transfer itself is not a tax on the Utility or on customers.

An intrafund transfer is a budgetary allocation from one municipal fund to another. Prior to the passage of Propositions 218 and 26, cities were permitted to make a profit on municipal utility operations, unless restricted by city charter. (*Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 922 (*Fresno*).) One rationale for a transfer was to allow the municipality a reasonable return on investment that would provide the utility with funds to pay debt and replacement costs, and compensate the municipality for the risks of building and maintaining a utility, instead of pursuing other investment opportunities. (*Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1182.) Another rationale was to provide the municipality with a "payment in lieu of taxes." (*Redding*, *supra*, 6 Cal.5th at p. 6; *Oneto v. City of Fresno* (1982) 136 Cal.App.3d 460, 465–466; *Fresno*, *supra*, at p. 917.) Under this reasoning, an intrafund transfer provides the city with funds that the utility would have paid in taxes if it were a private enterprise, rather than a city department. (*Redding*, *supra*, at p. 13.) Some cities design the intrafund transfer to cover costs associated with the services provided to the utility by other city departments. (*Id.* at p. 4.) There was no evidence in this case, however, that the intrafund transfers covered the cost of any actual services provided by City departments to the Utility.

An intrafund transfer may be conceived of as a payment in lieu of taxes, but it is not a tax imposed on the Utility by the City. The act of transferring amounts from

one local government fund to another is not a charge imposed by the local government. (*Redding*, *supra*, 6 Cal.5th at p. 12 ["'[t]he budgetary act of *transferring sums* from one fund to the other does not constitute' the imposition of a levy, charge, or exaction by a local government on those who pay the charge. Accordingly, the [intrafund transfer] per se cannot be a tax"].)

The annual transfer is also not a tax imposed on customers. "It is only the *rate*, not the [intrafund transfer], that is imposed on customers for electric service." (*Redding*, *supra*, 6 Cal.5th at p. 12.) The *Redding* court cited *Webb v. City of Riverside* (2018) 23 Cal.App.5th 244 (*Webb*), to support the conclusion that an intrafund transfer is not a tax imposed on customers. In *Webb*, the city changed its methodology for calculating the annual transfers from the electric utility to the city's general fund, which increased the amount that was transferred but did not raise customer rates. (*Id.* at p. 249.) The *Webb* court held that a revision to the methodology that does not increase the amount levied on ratepayers is not a tax increase. (*Id.* at p. 260.)

In this case, the annual transfer is a budgetary allocation from one fund to another that, standing alone, is not a tax. We turn to whether the rates imposed on customers exceeded the reasonable costs of providing service, and were therefore a tax.

C. Rates

It is undisputed that the electric rates are charges imposed by the City on ratepayers. This case addresses whether the charges, as amended in 2013, exceeded the reasonable costs to the City of providing electricity to those ratepayers and required voter approval. The City contends that because the voters enacted the charter provision providing for the annual transfer in 1946, the transfer is either a cost of providing electric service or a tax approved by the voters. The City also argues the trial court should have considered that alternate sources of revenue were available to pay the annual transfer. We conclude that the amount of the rates in excess of the reasonable costs of providing service was a tax under article XIII C. The trial court, however, will have to resolve conflicting evidence in the record to determine whether the amount of the tax increased when the rates were amended in 2013, triggering the need for voter approval.

1. Transfer is Not a Cost of Service

The City contends the annual transfer was a cost of providing service, required by the charter and approved by the voters, which may be passed on to ratepayers. We conclude the City has not shown that the annual transfer is an expense which can be passed through to ratepayers as a cost of service.

First, the City argues that the charter requires the Utility to pay the annual transfer, and therefore, the annual transfer is a cost of the Utility which may be passed through to ratepayers in the same manner as taxes and fees imposed by state and federal entities may be passed on to ratepayers. This is incorrect. The Utility is only required to transfer funds under certain conditions: the Utility must have a surplus to transfer, and the transfer cannot endanger the financial condition of the Utility. If there is no surplus, then there are no funds to transfer. If necessary to protect the financial condition of the Utility, the City may reduce or waive an annual transfer. The transfer provisions do not require the City to charge ratepayers any amount in order to generate a surplus to fund the transfer. The annual transfer provision of the charter cannot be construed as a cost of providing service.

We note that the City cannot accomplish indirectly what it is prohibited from doing directly. The constitutional provisions preclude the City from imposing a charge on ratepayers in excess of the cost of providing service without voter approval. The City cannot circumvent this limitation by imposing a charge for general fund expenses on its own department and then characterizing the charge as a cost of service which can be passed on to ratepayers without voter approval.

The City's second argument is that by approving the charter provision for the annual transfer, the voters implicitly approved a charge on ratepayers to fund the

annual transfer. In other words, the voters intended to contribute surplus revenue to general services and understood the utility rates would be increased by an amount to generate the surplus. We disagree. The Utility's surplus fund holds excess revenue from the waterworks and the electric works. Nothing in the language of the charter provision requires the Utility to generate funds for the annual transfer from electricity ratepayers or water consumers in any particular manner. The Utility was required to provide funds for the annual transfer if surplus funds were available from any source. The Utility could have a surplus for many reasons, including an unexpected increase in consumption or non-rate resources. In fact, the City contends in this case that the Utility had sufficient non-rate resources from the electric works to fund the annual transfer during the years at issue. We find that although voters approved the annual transfer to the general fund, they did not additionally approve a charge on ratepayers to generate revenue for the transfer.

The City does not claim that the annual transfer approximates the cost of any city services provided to the Utility, and has not attempted to establish the actual cost of any services the City provided to the Utility which were not incorporated in the rates. The annual transfer is a cost of service that the Utility is entitled to recoup from utility consumers only to the extent that it pays the Utility's expenses. (See *Fresno*, *supra*, 127 Cal.App.4th at p. 927 [considering whether in lieu fees were a cost of business

under article XIII D, § 6].) In this case, the City has not argued that the annual transfer pays any actual costs of the Utility. The annual transfer was not a cost of service to ratepayers.

2. Calculating Reasonable Costs

Common sense dictates that the reasonable costs of service are measured by the amount of costs that the utility projected it would need to pay when the rates were adopted. If the rates were constitutional at the time they were imposed, extended, or increased, they do not subsequently become unconstitutional because actual costs vary from projections. The amount of reasonable costs includes the total costs projected to provide service when the rates are adopted, even if the utility intends to pay a portion of the costs with non-rate revenue. When the 2013 rates in this case were adopted, the rates were not set to recoup the entire amount necessary to fund cash reserves mandated by prior regulation. On appeal, the City contends the additional amount required to replenish the cash reserves can be included as a cost of service. In this case, however, the City intended to leave the deficit unfunded and did not intend to replenish the cash reserves fully. Since the City did not intend to pay the unfunded portion of the cash reserves at the time the rates were adopted, it cannot be considered a reasonable cost of service covered by the rates.

In determining the amount to be recovered from ratepayers, the City contends, and we agree, that ratepayers bear the burden of covering the costs of their service, and have no right to benefit from a utility's receipts of non-rate revenue in the calculation of rates. (*Redding*, *supra*, 6 Cal.5th at pp. 18–19.) In *Redding*, rate revenue was not sufficient to pay all of the utility's costs of providing retail service. The utility's rates were calculated to cover a portion of the costs of providing service and an annual transfer of $6 million to the city's general fund, while the utility intended to pay additional operating expenses of $34.6 million with non-rate resources. (*Id.* at p. 17.) The *Redding* court noted that the city was not required to subsidize ratepayers by reducing their utility expenses with non-rate revenue. (*Ibid*.) After applying the rate revenue to the uncontested operating costs, the court concluded the remaining deficit and the annual transfer were satisfied from other sources of income. (*Ibid*.) "Because the budgetary transfer was not paid out of rate revenues, it was not part of a charge imposed on ratepayers." (*Id.* at p. 19.) The amount incorporated in the rates based on the annual transfer in that case did not generate excess revenue for the general fund, and therefore, it did not constitute a tax under article XIII C. (*Ibid*.)

In this case, the City contends that the rate calculations relied on non-rate revenues, and wholesale revenues in particular, to reduce the costs recovered from ratepayers. The Union asserts that the rate calculations did not apply non-rate revenue to reduce the amount of costs

recovered from ratepayers. The parties also dispute whether the amount of wholesale revenue available to reduce costs was gross wholesale revenue or net wholesale revenue after deducting the costs of generating the wholesale revenue. The trial court declined to resolve these factual disputes, because the court considered the City's admission that the rate calculation included the amount of the annual transfer to be binding on the determination of whether rate revenue funded the annual transfer. As *Redding* shows, however, the City is not limited to the costs used to calculate rates in proving the total amount of the Utility's reasonable costs of service at the time rates were set. We cannot resolve the parties' factual dispute as to whether non-rate revenue subsidized retail rates on the current record. The matter must be remanded to the trial court for a factual determination.

Under either party's calculations, however, the projected non-rate revenue did not fully cover the projected expense of the annual transfer. The City concedes that the amount of wholesale revenues projected for 2013 was less than the anticipated amount of the annual transfer to the general fund. We therefore provide guidance to the trial court to resolve whether the amount of the rate in excess of the costs of service was a tax that required voter approval.

3. Amount in Excess of Costs is a Tax

A portion of the charge for electricity exceeded the Utility's reasonable costs to provide electric service. We conclude that the amount in excess of costs, rather than the entire charge, is a tax under article XIII C, section 1, subdivision (e).

As stated above, a tax is "any levy, charge, or exaction of any kind imposed by a local government," with seven exceptions. (Cal. Const., art. XIII C, § 1, subd. (e).) The applicable exception in this case is for a charge "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Cal. Const., art. XIII C, § 1, subd. (e)(2).)

When a charge exceeds the costs of service, the language of the Proposition 218 (codified at Cal. Const., art. XIII C, § 1, subd. (e)) allows for more than one reasonable interpretation of what constitutes the "tax." One interpretation suggests that when a charge "exceed[s] the reasonable costs to the local government of providing the service," the entire charge is a tax. A more commonsense interpretation, however, read in the context of the entire article, is that only the portion of the charge in excess of the costs of service is a tax under article XIII C, section 1, subdivision (e).

To determine the intent of the electorate, we look first to the words of the initiative, giving them their ordinary and generally accepted meaning. (*County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 650.) "'[T]he "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.]' (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)" (*Ibid.*)

"The term 'tax' in ordinary usage refers to a compulsory payment made to the government or remitted to the government. Taxes ordinarily are imposed to raise revenue for the government (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 437 (*California Farm*) ['Ordinarily taxes are imposed for revenue purposes and not "in return for a specific benefit conferred or privilege granted"']; *Sinclair Paint* [*Co. v. State Bd. of Equalization* (1997)] 15 Cal.4th [866,] 874 ['In general, taxes are imposed for revenue

purposes, rather than in return for a specific benefit conferred or privilege granted']; *Morning Star Co. v. Board of Equalization* (2011) 201 Cal.App.4th 737, 750), although taxes may be imposed for nonrevenue purposes as well (see *Washington v. Confederated Tribes* (1980) 447 U.S. 134, 158 ['taxes can be used for distributive or regulatory purposes, as well as for raising revenue . . .']).” (*Schmeer*, *supra*, 213 Cal.App.4th at p. 1326.)

Referring to the portion of the charge that exceeds the costs of service as a tax is consistent with ordinary usage of the term. The portion of the charge that covers reasonable costs of service is not imposed to raise revenue for the City and not a tax under the ordinary, commonsense understanding of the term. In addition, if the entire rate is characterized as a tax, the provision does not harmonize with provisions on general and special taxes. Under article XIII C, section 2, all taxes imposed by local government must be deemed general or special taxes. A “general tax” is “any tax imposed for general governmental purposes” (Cal. Const., art. XIII C, § 1, subd. (a)) and a “special tax” is “any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund” (*id.*, art. XIII C, § 1, subd. (d)). The electric rates as a whole cannot be considered a general or specific tax under the definitions provided. The rates as a whole are not imposed for general government purposes. They are also not imposed as a whole for specific purposes, because one portion of the rate revenue covers costs of service and another portion is

transferred to the general fund for general government purposes. If the electorate intended the term tax to refer solely to the portion of the charge in excess of the amount necessary to cover the costs of service, however, the excess portion can be properly classified as a general tax. We conclude that the tax in this case was the amount of the rate that exceeded the Utility's costs of providing service, not the entire rate charged.

4. Tax Increase

The trial court found that the City increased electric rates in 2013, but did not determine whether the City increased the amount of the tax incorporated in those rates. The judgments must be reversed for the trial court to determine whether the tax increased under the 2013 rates.

i. Applicable Law

Article XIII C, section 2 provides that no local government may "impose, extend, or increase any general tax" without voter approval. A tax is "imposed" when it is initially enacted. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 944.) If a tax was illegal when it was imposed, then continued imposition and collection of the unauthorized tax may be an ongoing violation for statute of limitations purposes. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 812; *California*

Cannabis Coalition v. City of Upland, *supra*, 3 Cal.5th at p. 945.)

"A tax is extended when an agency lengthens the time period during which it applies. (Gov. Code, § 53750, subd. (e).)" (*Webb*, *supra*, 23 Cal.App.5th at p. 258.)

Government Code section 53750, subdivision (h)(1), provides that a tax, assessment, or property-related fee or charge is "increased" if an agency's decision either: "(A) Increases any applicable rate used to calculate the tax, assessment, fee, or charge. [¶] (B) Revises the methodology by which the tax, assessment, fee, or charge is calculated, if that revision results in an increased amount being levied on any person or parcel." A tax, fee, or charge is not "increased" by an agency action that either: "(A) Adjusts the amount of a tax, fee, or charge in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996. [¶] (B) Implements or collects a previously approved tax, fee, or charge, so long as the rate is not increased beyond the level previously approved by the agency, and the methodology previously approved by the agency is not revised so as to result in an increase in the amount being levied on any person or parcel." (Gov. Code, § 53750, subd. (h)(2).)

ii. Additional Facts

A staff report to the city council prepared in May 2006, recommended approval of two ordinances amending electric rates effective July 1, 2006, and July 1, 2007, respectively. The rates under both ordinances included an amount that was not attributable to any costs of service, but rather was designed to provide a reasonable rate of return to the Utility for transfer to the general fund. The rates that became effective in 2007 were based on projected retail rate revenues of $104,847,000, and retail rate expenses of $110,501,000, a sum that included $18,254,000 for the annual transfer to the general fund. After subtracting the amount of the annual transfer, the costs of service recovered from retail rate revenue were therefore $92,247,000. Rate revenue exceeded the costs of service by $12,600,000. The amount of the excess was 13.66 percent of the projected retail rate revenues. The ordinances were adopted as proposed.

Under the City's rate amendment ordinance passed in 2013, electric rates for fiscal year 2014 increased 8 percent. The Utility provided financial projections to Borismetrics which forecast retail rate revenues of $170,690,622 for fiscal year 2014, and retail operating expenses of $164,897,661, not including an annual transfer to the general fund of $20,607,000. Retail operating revenues exceeded expenses by $5,792,961. The excess amount charged to ratepayers based on the Utility's projections was projected to be approximately 3.51 percent of the operating expenses for

fiscal year 2014. It is not clear from the Utility's forecast if the cost of funding cash reserves was included in the retail operating expenses or was considered a separate cost.

Rates were scheduled to increase an additional 7 percent in fiscal year 2015, 5 percent in fiscal year 2016, 2 percent in fiscal year 2017, and 2 percent in fiscal year 2018. In each of the fiscal years from 2015 through 2018, the Utility forecast receipt of net income from retail operations. The Borismetrics rate study showed that rate revenue would gradually fund all but $9.6 million of the Utility's cash reserve requirement.

For fiscal year 2018, the information that the Utility provided to Borismetrics forecast retail rate revenues of $203,546,257, and retail operating expenses of $170,220,575, without including an annual transfer of $19,607,000. Under the projection, operating revenues would exceed expenses by $33,325,682 for the fiscal year. The excess, therefore, was 19.58 percent of the total projected retail operating expenses. However, if the Utility intended to contribute net retail income of $14,569,759 to its cash reserve requirement, the total reasonable costs of service were $184,790,334. In that case, revenues exceeded expenses by $18,755,923, which was 11.02 percent of the total projected retail operating expenses. Borismetrics may have interpreted the Utility data independently to prepare rates.

iii. Analysis

The parties agree that when the City amended its electric rates in 2006, the City was not required to obtain voter approval of the excess amount incorporated in the rates. Proposition 26 defined a tax broadly in 2010, but did not affect charges by local government that were in existence at the time the proposition was enacted. "The analysis and arguments for and against the initiative in the official voter information guide discussed the impact of the initiative on the ability of local government to raise revenues." (*Schmeer*, *supra*, 213 Cal.App.4th at p. 1328.) The analysis by the Legislative Analyst stated that most charges in existence at the time the proposition was enacted would not be affected, unless the local government later increased or extended the charges. The local government would have to comply with voter approval requirements of Proposition 26 to order to increase or extend the charges.

The excess charge was not imposed for the first time when rates were amended in 2013. When the City amended its rate ordinance to increase electric rates in 2013, the rates continued to include an excess amount. The electric rates, including the excess charge, continue indefinitely under the rate ordinance. Since the excess charge to ratepayers has no termination date, the 2013 rates did not extend the charge beyond an end date.

The trial court did not determine from the conflicting evidence about revenues and costs employed in the rate

setting process whether the excess amount of the charge was increased in the 2013 rates from the amount of the charge under the 2006 rates. The portions of the judgment declaring the 2013 rates invalid and requiring rebates to ratepayers based on the amount of the annual transfers under the 2013 rates must be reversed. The cases must be remanded for the trial court to determine whether the amount of the tax charged by the City increased under the 2013 rates, such that the City was required to obtain voter approval to impose the increase. We note that if ratepayers are entitled to recover the amount of a tax increase as a remedy, the City may show that the actual costs of service paid by the Utility were greater than the projected costs, including contributions to cash reserves, and the Utility used non-retail rate resources to pay the annual transfers.

DISPOSITION

The portion of the judgment concerning tax violations is reversed. In all other respects, the judgment is affirmed. The matter is remanded to the trial court for further proceedings in accordance with this opinion. The parties are to bear their own costs on appeal.

MOOR, Acting P.J.

We concur:

KIM, J.

SEIGLE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.